In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 250

REMLER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contracted with the Navy to deliver forty sound-amplifying systems for use on shipboard. After delivery, petitioner filed a claim for additional compensation with the Contracting Officer under the "changes" clause of its government contract (see, Pet. 4, n. 2). Petitioner's claim was based on two contentions: *first,* that the contract specifications, although not using brand names, were so phrased as to call for the use of "recorders" and "rotary switches" made by specific companies, and that the items were not available from those manufacturers when petitioner required them, so that petitioner had to incur the extra expense of having those items specially

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made; and, *second,* that inadequate contract specifications for certain switch components resulted in faulty switches, which had to be replaced at extra cost to petitioner. The Contracting Officer rejected petitioner's claims as unfounded.

Petitioner appealed that decision to the Armed Services Board of Contract Appeals pursuant to the standard "disputes" clause of its contract and the Armed Services Procurement Regulations.[1] After a hearing at which petitioner was given opportunity to introduce evidence and present written and oral argument in support of its contentions, the Board of Contract Appeals upheld the Contracting Officer's decision. The Board ruled that the contract did not require any particular "brand" of component, but rather set out performance requirements for the items in question, and found that a number of firms could have met the specifications for the required recorders. On the basis of the evidence before it, the Board concluded that manufacturing errors, not faulty specifications, caused petitioner's difficulties with the switch components.

Petitioner sought review of the Board's decision in the Court of Claims, renewing the contentions it had presented to the Board and requesting a trial *de novo.* That court overruled petitioner's contention that it was entitled to a trial *de novo,* rejected petitioner's claims of alleged unfairness in the conduct of the Board and upheld the decision of the Board, as "amply supported by the record" (Pet. 18–23).

[1] ASPR 7-103.12 (Pet. 24); 32 C.F.R. 7.103-12 (1954 ed.).

Its decision is correct and further review is not warranted.

Petitioner's contention that he was entitled to a trial *de novo* in the Court of Claims is fully answered by this Court's decisions in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 and *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394. In both of those cases the Court recognized that where a claim arises under a provision such as the "changes" clause of a government contract, the Court of Claims may not review the matter *de novo* but is limited to reviewing the administrative record.[2] See, also, *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 512–513.

Nor is there any substance to the claim that, in reviewing the administrative record, the Court of Claims was derelict in failing to examine the three volume record for errors not cited by petitioner.[3] The court below followed ordinary appellate practice. *E.g.*, Court of Claims Rule 60(a)(4); Supreme Court Rule 40(1)(e), C.A.D.C. Rule 17(b)(5). Petitioner's position amounts to an assertion that the Court of Claims should have searched for errors which peti-

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[2] Petitioner contends in this Court (Pet. 9, 12) that the interpretation of the specifications of the contract was a question of law which should have been decided by the Court of Claims under the Wunderlich Act. In fact, the Court of Claims *did* consider the interpretation of the contract specifications *de novo* (Pet. 20), and agreed with the Board as to their meaning.

[3] Indeed, the Court of Claims, after petitioner had failed to point to portions of the record to support its claims, allowed petitioner to file an additional brief and held a second oral argument in order that petitioner might be afforded an opportunity to support its contentions from the record.

tioner was unable to find, and is apparently still unable to identify.[4]

The remainder of petitioner's assertions are disposed of by the Court of Claims' holding, affirming the Board's determination, that the government did not, by contract or otherwise, assume the risk that the components which the contractor intended to use would remain available, a risk normally born by the contractor.[5] The failure of petitioner's suppliers, through no fault of the government, hardly creates liability on the government to compensate petitioner for any losses incurred thereby.[6]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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[4] Petitioner fails to point to any alleged error not raised and considered below.

[5] Petitioner's claim that the Board treated it improperly in failing to reopen the hearing (Pet. 10) to receive additional testimony by its witnesses is frivolous. The evidence offered was relevant only to a defense not reached by the Board or the Court of Claims. Thus there could be no prejudice in the evidentiary ruling. As to the purported lack of impartiality by the Board. (Pet. 16), which the Court of Claims found not to exist (Pet. 23), petitioner failed to make any objection before the Board in this connection or attempt otherwise to substantiate its charge.

[6] In fact, the Board found that the recorders could have been purchased from other sources for prices commensurate with those of the recorders petitioner had intended to utilize, and that petitioner's switch supplier replaced faulty switches at no extra charge. These findings were affirmed by the Court of Claims as "amply supported by the record" (Pet. 20).

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